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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-811

C. L. SWAIN,

Petitioner,

v.

JASPER C. PRESSLEY,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals in *Pressley v. Swain* (Pet. App. D) is reported at 515 F.2d 1290. The *Pressley* opinion incorporates by reference the court's opinion in *Palmore v. Superior Court* (Pet. App. A), which is reported at 515 F.2d 1294.

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court erred when it dismissed for want of jurisdiction a habeas corpus petition stating federal constitutional claims filed by a prisoner convicted in the Superior Court for the District of Columbia who had exhausted his remedies in the local court system.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

23 D.C. Code §110(g) provides:

> (g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Article I, Section 9, Clause 2 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

COUNTERSTATEMENT OF FACTS

On May 23, 1973, Jasper C. Pressley, a prisoner at Lorton Reformatory serving a sentence imposed by the Superior Court of the District of Columbia[1] filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Columbia. The petition alleged that he was in custody under the authority of the United States and that his conviction had been obtained in violation of the Fourth, Fifth, and Sixth[2] Amendments to the United States Constitution and prayed for his release. Jurisdiction was claimed under 28 U.S.C. §2241.

After appointment of counsel and the filing of papers on all sides, the matter came on for a hearing on the

[1] Mr. Pressely had been found guilty of grand larceny (22 D.C. Code §2201) and larceny from the District of Columbia government (22 D.C. Code §2206) and sentenced to 32 to 96 months and 20 to 60 months respectively in the custody of the Attorney General. He appealed and his convictions were affirmed by the District of Columbia Court of Appeals in an unpublished order. (App. 109) In addition to his direct appeal, he filed two further post-conviction motions with the trial court. These were treated as collateral attacks; both were denied on the merits; both denials were appealed and affirmed by the District of Columbia Court of Appeals. (App. 111, 114.)

[2] Although Mr. Pressley raised a broad range of issues in his habeas corpus petition, the gist of his claim was that he had been denied the effective assistance of counsel in violation of the Sixth Amendment. As he put it in his original *pro se* petition: "The Petitioner's argument was and remains, that: THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AMENDMENT IN THAT TRIAL COUNSEL'S GROSS INCOMPETENCE BLOTTED OUT THE ESSENCE OF A SUBSTANTIAL DEFENSE. . . ." (Emphasis in original) App. 63.

question of the District Court's jurisdiction to hear the petition for the writ. On July 18, 1973, the District Court issued an order stating that the petition was dismissed "as this Court does not have jurisdiction over this matter, by virtue of 23 D.C. Code §110(g)." (Pet. App. F) Mr. Pressley's appeal to the United States Court of Appeals for the District of Columbia Circuit was timely.

The Court of Appeals *sua sponte* set Mr. Pressley's case for consideration *en banc* and, after full briefing and argument,[3] reversed the judgment of dismissal by the District Court and remanded for consideration on the merits of Mr. Pressley's claim. Eight of the nine judges sitting joined in Judge Tamm's opinion for the court.[4] The government filed a timely petition for a

[3] After briefing and before argument, the United States Court of Appeals *sua sponte* remanded the case to the District Court for a clarification of its order of dismissal. Specifically, the Court of Appeals inquired whether the District Court had considered Mr. Pressley "as one who had exhausted his remedies in the local court system. . . ." The District Court advised the Court of Appeals that it did not find that Mr. Pressley had exhausted his local remedies. The Court of Appeals reversed the District Court on this point. The petition in this Court did not seek certiorari on the exhaustion of local remedies point, Pet. Br. 15 n. 10, and the issue is not before this Court. Much of the government's "Statement" (of Facts) at Pet. Br. 7-11 is devoted to facts relevant only to the exhaustion of local remedies issue.

[4] The Court of Appeals set Mr. Pressley's case for argument on the same day as *Palmore v. Superior Court*, No. 74-1832, and the opinions in the two cases were both issued on July 9, 1975. The opinion in Mr. Pressley's case refers to, without repeating, the points made in the opinion in *Palmore*. Both cases were brought into this Court by a single writ of certiorari. Counsel for Mr. Pressley is informed by a letter dated July 16, 1976, from counsel for Mr. Palmore to the Clerk of this Court that the writ as to Mr. Palmore's case will be dismissed by consent of the

(continued)

writ of certiorari in this Court, and the writ was granted on February 23, 1976 (A. 116). 424 U.S. 907 (1976).

SUMMARY OF ARGUMENT

In 1970 Congress passed the District of Columbia Court Reform and Criminal Procedure Act.[5] The primary purpose of the Act was to reorganize the courts in the District of Columbia so that criminal cases could be disposed of more expeditiously. Prior to the Court Reorganization Act, most serious local crimes had been prosecuted in the United States District Court. The extensive delays that were prevalent in criminal prosecutions in the District Court were thought to be contributing to the high crime rate in the District.

In order to reduce delays in criminal prosecutions, Congress provided for two parallel court systems in the District of Columbia. The first was the traditional system of federal courts created pursuant to Article III of the Constitution, which were henceforth to have the same jurisdiction as all the other federal courts in the rest of the country.

The prosecution of local crimes (as well as local civil cases) was transferred from the federal courts to a

(footnote continued from preceding page)

parties. The government's brief contains what purports to be a summary of the Court of Appeals' opinions in *Pressley* and *Palmore*. Pet. Br. 11-15. Mr. Pressley disagrees with the government's characterization of the Court of Appeals opinions, which speak for themselves.

[5] Act of July 29, 1970, Public Law 91-358, 84 Stat. 473, hereinafter referred to as the "Court Reorganization Act."

newly created local court system. The new local courts, which were created pursuant to Article I powers granted Congress by the District of Columbia Clause of the Constitution,[6] were vastly expanded in size beyond the old local courts of limited jurisdiction in order to accommodate the large volume of new business to be committed to the jurisdiction of the new courts. Efforts were made to upgrade the administration of the new courts and the quality of their judicial personnel.

In creating these new non-Article III courts, Congress stated its intention to emulate the relationship between the state and federal courts as they co-exist in the various states. In this way, the District would have local courts devoted entirely to local judicial business while the federal courts would be free to pursue the traditional federal jurisdiction.

One part of the elaborate statutory scheme necessary to create an entirely new local court system was a section – 23 D.C. Code §110 – that granted to the new local courts the power to review their own convictions by way of collateral attack by motion. The language creating this remedy by motion in the new local courts was borrowed from the general federal statute that provides for collateral attack by motion in the federal courts, 28 U.S.C. §2255.

The government argued below that the statute creating the post-conviction remedy by motion in the new local courts made that remedy the exclusive remedy for prisoners of the local courts and cut off their traditional right to habeas corpus review in the Article III courts. In short, the government asserted that 23 D.C. Code §110 extinguished the jurisdiction

[6] *U.S. Const.* art. I, §8, cl. 17.

of the inferior Article III courts to hear the habeas corpus petition of a prisoner convicted in the local District of Columbia courts even if that prisoner had been convicted in violation of his federal constitutional rights and had exhausted every remedy in the local court, without obtaining relief.

Eight judges of the Court of Appeals, sitting *en banc*, rejected the government's argument and found instead that 23 D.C. Code §110 contained an exhaustion provision that required nothing more than exhaustion of local remedies before a petitioner could be heard in the federal courts on habeas corpus.

The words of one subsection of the District of Columbia collateral attack by motion statute, 23 D.C. Code §110(g), read in a vacuum, would appear to reach the government's proposed result of cutting off habeas corpus in the Article III courts for District of Columbia prisoners. Mr. Pressley argues, however, that Subsection 110(g) should not be read to achieve such a drastic and novel result without first ascertaining whether it was in fact the intention of Congress to eliminate the federal habeas corpus jurisdiction of the Article III courts over prisoners of the local courts.

The government concedes that the intention of Congress is relevant to the interpretation that ought to be given the statute. Petitioners' Brief at pages 28-29 (hereinafter referred to as "Pet. Br."). Reference to the legislative history of 23 D.C. Code §110,[7] as a means of comprehending the intention of Congress, shows that Congress had a different, and much less ambitious, purpose than that contended for by the government.

[7] Subsection 110(g) has no separate legislative history beyond that pertaining to the whole of Section 110.

Section 110 was simply meant to codify the power of the new courts to review their own convictions and to specify the procedures by which that might be done.

Before Court Reorganization, the old District of Columbia local courts had held that the general federal post-conviction remedy by motion statute, 28 U.S.C. §2255, did not apply in the local courts. But the old local courts did find they had a general common law power to review their own convictions. The new statute, 23 D.C. Code §110, was simply an effort to codify this result and to provide a simple and expeditious method of collateral attack in the new courts.

Given an affirmative congressional intention to codify for the new courts the already existing District of Columbia collateral attack, there are a number of other circumstances that make it even more doubtful that Congress intended to restrict the traditional habeas corpus jurisdiction of the Article III courts. When 23 D.C. Code §110 was pending before Congress, it was seen as no more than a restatement of existing law, which had always included access to the Article III courts in the District of Columbia for ultimate resolution of federal constitutional questions arising in the course of criminal prosecutions in the old local court system. There is no hint in the legislative history that Congress intended to alter the *status quo* or to reach the result that the government urges on this Court. To the contrary, there is every indication that Congress saw 23 D.C. Code §110 as containing nothing more than "technical changes" designed to conform the words of 28 U.S.C. §2255 to the contours of the new District of Columbia court system.

If Congress intended to close the doors of the Article III courts to prisoners of the new local court system, then it chose a very odd way of doing so. The government would have this Court believe that Congress secreted an implied repeal of the habeas jurisdiction of the Article III courts all across the country in a remote corner of the District of Columbia code. The government's argument becomes even more improbable when one considers the care with which Congress amended a host of other general statutory provisions in Title 28 of the United States Code governing the federal courts. The general habeas corpus statute was not amended.

Also, there is no evidence in the legislative history that the Congress intended to treat collateral attack in the District of Columbia any differently than it is treated in the state courts to which the new District of Columbia system was meant to be analogous. Of course, in the states, federal review of constitutional questions is available to those who have exhausted their state remedies.

The Court of Appeals' opinion, which interprets 23 D.C. Code §110(g) as a requirement that District of Columbia prisoners exhaust their local remedies, is consistent with a tradition in this Court of reading statutes that appear to restrict access to Article III habeas corpus so as to avoid difficult questions that would otherwise be raised by the Suspension Clause of the Constitution.[8] In the past in other cases, the government has argued to this Court that Congress had committed constitutional adjudication of prisoners' claims exclusively to the state courts, to the courts

[8] *U.S. Const.* art. I, §9, cl. 2.

martial, to the immigration authorities, or to other non-Article III forums. In every such case, this Court has read those statutes as merely describing the final procedural point in the non-Article III process. That final point thereby defines what non-Article III remedies must be exhausted before access to the Article III courts becomes available.

This Court has explained its tradition of interpreting finality statutes as a method of avoiding difficult constitutional questions that would be raised if the finality statutes in fact operated to the exclusion of the Article III courts. Any interpretation of the finality statutes that closes the Article III courts to habeas petitioners would force this Court to define the as-yet undefined "privilege of the writ of habeas corpus" protected by the Suspension Clause of the Constitution. Although this Court has not yet specified exactly what is protected by the Suspension Clause, persons confined by authority of the United States have enjoyed the right to seek ultimate adjudication of their federal constitutional claims in the Article III courts without interruption since the inception of our Republic.

Mr. Pressley recognizes that this Court has accepted a substitute for habeas corpus rights of prisoners held by the United States. This Court found the federal post-conviction remedy by motion in 28 U.S.C. §2255 to be a constitutionally acceptable substitute for traditional habeas corpus. But this Court has since held that only a remedy like Section 2255, which is "exactly commensurate" with traditional federal habeas corpus, can avoid raising the thorny constitutional issues implicated in the Suspension Clause of the Constitution.

The government has suggested that the remedy in the new local courts is a constitutionally acceptable

substitute for the remedy formerly afforded by the Article III courts. But the new local courts are Article I courts whose judges serve for a fixed term of years, are subject to removal, and are not guaranteed their salaries. Courts manned by such judges are different from Article III courts, whose judges enjoy an independence that comes only from the type of salary and tenure protections that are written into Article III of the Constitution. Therefore, a substituted remedy in a non-Article III court cannot pass the "exactly commensurate" test and thereby avoid constitutional difficulty.

Mr. Pressley asserts that this case is one in which a fairly avoidable constitutional question should be avoided. Congress did not intend 23 D.C. Code §110(g) to reach the result that would provoke the constitutional issue in this case. The Court of Appeals' interpretation, which avoids the constitutional question, is in accord with the general scheme of the Court Reorganization Act and with accepted norms of statutory interpretation. The Court of Appeals' interpretation of Section 110 as requiring exhaustion of local remedies maintains the *status quo* in the District of Columbia and leaves Congress free to enlarge upon or clarify the statute, if there is any need for clarification or enlargement.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I.

THE GOVERNMENT'S INTERPRETATION OF 23 D.C. CODE §110 LEADS TO A RESULT THAT CONGRESS DID NOT INTEND.

The government argues to this Court that in enacting 23 D.C. Code §110, which codifies a post-conviction remedy by motion in the new local courts, Congress meant to make that remedy exclusive and to cut off the traditional access of District of Columbia prisoners to the Article III courts for ultimate resolution of their federal constitutional claims.

Mr. Pressley, on the other hand, maintains that Congress had a different, and a much more modest, intention in passing Section 110. The intention of Congress was to do no more than to codify the local post-conviction remedy, the existence and source of which had previously been in doubt. Therefore, to give 23 D.C. Code §110 the reading prayed for by the government would be to reach a result that Congress never intended.

Examination of the legislative history of Section 110 shows that at the time Congress passed the Court Reorganization Act, the only post-conviction attack available in the local District of Columbia courts was by way of a common law motion. The expressed intention of Congress in enacting 23 D.C. Code §110 was to codify this common law remedy. In order to achieve this codification, Congress borrowed language from the general post-conviction motion statute applicable in the Article III courts, 28 U.S.C. §2255. The government is

unable to show any evidence that Congress intended a different consequence of borrowing that language: that the Article III courts in the District of Columbia would henceforth be closed to the habeas corpus petitions of prisoners of non-Article III courts.

Congress did evidence an intention to regulate the relations of the federal courts and the local courts in the District of Columbia in the same way that the relations of the state and the federal courts in the various states are regulated. That relationship includes federal habeas corpus for state prisoners. There is no indication that Congress intended to treat habeas corpus in the District differently from the way it is treated in the states. The lack of evidence of congressional intention to exempt post-conviction remedies from the state/federal analogy is highlighted by the fact that although Congress took pains to amend Title 28 of the United States Code so as to accommodate the new local District of Columbia courts, it did not amend the part of Title 28 that gives the Article III District Court jurisdiction over Mr. Pressley's case, 28 U.S.C. §2241.

Instead of reaching a drastic result that Congress did not intend, the Court of Appeals read 23 D.C. Code §110 as requiring no more than exhaustion of remedies in the new local courts before resort to the Article III courts on habeas corpus. In doing so, the Court of Appeals followed a distinct line of cases in this Court. In each of these cases, a statute appeared to commit all post-conviction attack exclusively to a non-Article III forum and thereby cut off access to the Article III courts on habeas corpus. In each case, this Court interpreted those statutes as requiring no more than exhaustion of the non-Article III remedies as a

prerequisite to ultimate constitutional adjudication in the Article III courts.

This Court should affirm the Court of Appeals' interpretation of Subsection 110(g) as requiring exhaustion of all appropriate remedies in the new local courts. This interpretation, joined in by eight of the nine judges of the Court of Appeals, avoids interference with federal habeas corpus – a result that Congress did not intend.

A. The Legislative History of 23 D.C. Code §110 Makes Clear That the Intention of Congress in Enacting Section 110 Was Simply to Resolve Doubts About the Existence and Nature of Post-Conviction Relief in the New Local Courts.

The government concedes that reference to the intention of Congress is relevant in interpreting this statute. Pet. Br. 28-29. Reference to the intention of Congress is appropriate because:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940) (citations omitted) (quoted at Pet. Br. 29).[9]

[9] *See also Train v. Colorado Public Interest Research Group*, 96 S.Ct. 1938, 1942, 48 L.Ed.2d 434, 441 (1976); and Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299 (1975).

In the case of 23 D.C. Code §110, evidence of the intention of Congress, which must necessarily affect how this statute is to be construed, is not consistent with the statutory interpretation urged by the government. From the legislative history of Section 110, there emerges an affirmative congressional intention to codify the existing District of Columbia law on post-conviction remedies. The expressed purpose of this codification was limited; it was intended to eliminate doubts as to whether or not such a remedy existed in the local District of Columbia courts and to establish the appropriate procedures to effectuate the remedy in those courts. There is not the slightest indication of a broader purpose to cut off the right of federal habeas corpus of local District of Columbia court prisoners.

In order to understand the legislative history of 23 D.C. Code §110, it is first necessary to understand the background of the problem to which Congress addressed itself in enacting that section. In 1948, Congress had passed the statute that is now codified as 28 U.S.C. §2255.[10] While the purposes of Section 2255 are more fully examined elsewhere in this brief,[11] it is sufficient at this point to say that 28 U.S.C. §2255 created a comprehensive new scheme for a simplified post-conviction remedy by motion in the federal courts. A new motion to set aside a conviction was provided in the context of the existing criminal case. This motion replaced the traditional independent civil action of habeas corpus. This reform solved certain housekeeping problems among the inferior federal courts and provided a less complicated format for litigating the same issues that had previously been litigated on habeas corpus.

[10] Act of June 25, 1948, c. 646, 62 Stat. 967.

[11] See Part I(B), *infra*.

The 1948 version of 28 U.S.C. §2255 applied to prisoners "under a sentence of a Court of the United States." It was quickly realized that the term "Court of the United States" was a term of art that referred to the courts created pursuant to Article III of the Constitution. The territorial courts, which are created pursuant to Article I, §8, cl. 17 of the Constitution, were therefore excluded. H.R. Rep. No. 352, 81st Cong., 1st Sess. (1949); 2 U.S. Code Cong. Serv. (1949), p. 1272. Accordingly, in 1949, one year after passage of the original 28 U.S.C. §2255, that section was amended to change the words "Court of the United States" to the broader term "court established by Act of Congress" so as to include the territorial courts. Act of May 24, 1949, c. 139, §114, 63 Stat. 105.

Inevitably, the question subsequently arose whether the broader term, "court established by Act of Congress," included the non-Article III courts that then existed in the District of Columbia. In the case of *Burke v. United States*, 103 A.2d 347 (D.C. Mun. App. 1954), the old District of Columbia Municipal Court of Appeals, an Article I court, was confronted by a post-conviction motion to set aside a conviction that had ostensibly been filed pursuant to the amended 28 U.S.C. §2255. The *Burke* court examined the 1949 amendment. First, the court noted that there was a clear-cut congressional intention to bring the territorial courts within 28 U.S.C. §2255. Second, the court could discern no statement of congressional intention to include the non-Article III District of Columbia courts within the Act. The court therefore held that even though the non-Article III District of Columbia courts were "courts established by Act of Congress," they

were not included in the amended 28 U.S.C. §2255 because Congress had not intended them to be.[12]

However, the *Burke* court went on to find that although 28 U.S.C. §2255 did not apply, nevertheless, the non-Article III local courts did have inherent power to review the legality of their own judgments.[13] While this decision preserved the right of prisoners to seek review of their confinements in the court in which the conviction had been entered,[14] the holding left the source and nature of this common-law remedy undefined. And, of course, the procedures to be followed on this newly discovered common law motion were nowhere codified.

Thus stood the law in the District of Columbia in 1970 when Congress proposed to completely reorganize the courts in the District of Columbia. The genesis of Congress' decision to reorganize the District of Columbia courts is simple to trace out. The crime rate in the District was alarmingly high. There was a large backlog of untried criminal prosecutions in the United States District Court for the District of Columbia, which then had jurisdiction over the majority of local, as well as federal, criminal cases. The fact of long delays between arrest and trial was thought to be

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[12]The *Burke* decision was followed without extensive discussion in *Ingols v. District of Columbia*, 103 A.2d 879 (D.C. Mun. App. 1954).

[13]This review could not have been by habeas corpus in the non-Article III local courts since their habeas jurisdiction was specifically limited to non-governmental confinements arising in the context of domestic relations. 16 D.C. Code §§911, 901 (1967 ed.).

[14]In addition, of course, to their traditional habeas corpus remedy in the federal Article III courts.

contributing to the high crime rate. *See generally* "Remarks of Senator Tydings," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, pp. 467-69 (5/19/69).[15]

[15]The government also points out that the high crime rate was of concern to Congress at the time it enacted the Court Reorganization Act and that the new local courts were designed to be better able to cope with the rapid increase in criminal prosecutions. Pet. Br. 36-37. With that much, Mr. Pressley agrees. However, the government goes on to suggest that post-conviction attack was part of the business that Congress intended to transfer to the new local courts. On this point, the government is confined to speculation since there is no evidence in the legislative history that Congress ever thought of the problem of collateral attack as contributing to the problem of backlog in the District Court. Nor is there evidence that Congress thought that transferring collateral attack to the new local courts would help to solve the caseload problem of the District Court. To fill this void, the government takes a few words of the legislative history out of context and claims that these few words imply the government's suggested result. The quoted words are: "Believing that 'swift and sure justice' would help relieve 'the soaring crime rate' and that 'reorganization of the court system . . . is a step toward swifter and surer justice in the District,' Congress determined to provide for a 'total transfer of local jurisdiction' . . ." to the new local courts. Pet. Br. 36-37. That characterization of the legislative history is inaccurate on two counts. First, the words "total transfer" appear as part of the phrase "total transfer of all purely local business to the local court system." H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 33 (1970). Whether federal habeas corpus is "purely local business" is one of the issues in this case, and the government does not, because it cannot, offer this Court any evidence that Congress considered the habeas corpus business of the District Court as to prisoners of the local courts to be a "purely local" matter. Instead, examination of the legislative history shows that the words "total transfer" were not used substantively, but descriptively, to separate

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Congress began holding hearings on the subject of the District's crime problem, and by 1969, a number of bills were pending in Congress each of which dealt with one or more facets of the courts' apparent inability to deal with the problem.[16] When President Nixon declared the reduction of crime in the District to be a goal of his administration, the Department of Justice undertook to draft comprehensive legislation. Essentially, the Department's bill reorganized the District of Columbia Courts so that local crimes would be tried in a greatly expanded and upgraded local court

(footnote continued from preceding page)

the proposal finally adopted by Congress from the numerous "partial transfer" proposals put forward by groups that testified before the various committees of Congress, *e.g.*, the Gesell/Ellison Commission's proposal for transfer to the new local courts only of crimes punishable by less than 15 years, and civil cases involving less than $25,000. "Recommendations for the Reorganization of Our Courts, Submitted by the Committee on the Administration of Justice," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st. Sess. Part III, pp. 581, 586 (5/19/69). What the House committee report actually said is subtly, but crucially, different from the impression given by the government's selected quotations, which although stitched into one piece in the government's brief, are actually scattered over eight pages of text. The House committee report says that "court reorganization" is related to the goal of "swifter and surer justice." "Court reorganization" is then defined as "total transfer of local jurisdiction" as is the case in the fifty states. Of course, in the fifty states, the Article III courts are available to hear the habeas corpus petitions of state prisoners. The federal habeas corpus jurisdiction is not local business. The government cannot point to a place in the legislative history where Congress linked its purpose to reduce the backlog of criminal cases to the removal of collateral attack to the new local courts.

[16]None of these bills mentioned post-conviction relief.

system thereby leaving the federal Article III courts free to concentrate on the matters that come within the jurisdiction of all federal courts.[17]

What is now 23 D.C. Code §110 made its first legislative appearance in the Department of Justice bill. That bill was introduced at the long-running hearings on the subject of crime in the District Committee of the United States Senate on July 15, 1969.[18] On that date, the bill was presented to the Senate by then Deputy Attorney General Richard J. Kleindienst, who orally summarized the contents of the bill.

First, Mr. Kleindienst summarized the general outlines of the proposed reorganization of the courts. Then he came to Title IV of the bill entitled "Criminal Law and Procedures," which contained a wide variety of provisions among which was the section which is now 23 D.C. Code §110.[19] The relevant parts of Mr. Kleindienst's statement are these:

[17]The Court Reorganization Act begins its definition of the civil jurisdiction of the United States District Court for the District of Columbia as follows: "In addition to its jurisdiction as a United States district court. . . ." 11 D.C. Code §501. Habeas corpus invokes the civil jurisdiction of the court. *Cross v. Burke*, 146 U.S. 82, 88 (1892); *Farnsworth v. Montana*, 129 U.S. 104, 113 (1889); *Fisher v. Baker*, 203 U.S. 174, 181 (1906).

[18]The bill was introduced as S. 2601 and after extensive hearings was subsequently reported out by the committee and passed by the Senate. Virtually the same bill was introduced in the House as H.R. 16196 where it was passed as amended on the House floor, there having been no committee hearings on the bill in the House. Section 110 was ultimately passed exactly as proposed by the Department of Justice and was not specifically debated on the floor of the Senate or the House. After passage by both houses, the bill was signed into law. 84 Stat. 473.

[19]The bill was subsequently reorganized so that, when passed, Title IV had become Title II (still entitled "Criminal Law and Procedure") and Section 402 had become part of Section 210 ("Codification of Title 23 of District of Columbia Code"), which contains the new 23 D.C. Code §110. However, the wording of the section did not change.

> Title IV of the Reorganization Act contains the sections dealing with criminal law and procedure. Most of the sections are merely restatements of existing law and wherever appropriate the language of Federal statutes or Federal rules has been used.
>
> These are the changes: . . .
>
> 5. Procedures for post conviction remedies (§402 enacting District of Columbia Code 110). Although the local court may have inherent power in the matter of post conviction remedies, a special procedure was created to eliminate unnecessary litigation and add certainty to the law.

"Statement of Richard J. Kleindienst," *Hearing Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, p. 1154 (7/15/69).

Mr. Kleindienst's remarks are a direct statement of what the Department of Justice thought 23 D.C. Code §110 would accomplish. He referred, though not by name, to the assumption in the *Burke*[20] case that the old local Article I courts had an inherent power to hear post-conviction attacks. He then made it clear that the purpose of the new Section 110 was merely to give certainty to the law by codifying what had theretofore been a common law power. All of this, he characterized as "merely restatements of existing law." Of course, "existing law" included not only the common law post-conviction attack in the local non-Article III courts, but also the traditional access to the federal Article III courts under 28 U.S.C. §2241 for adjudication of federal constitutional questions. *E.g.*,

[20]*Burke v. United States, supra*, 103 A.2d 347 (D.C. Mun. App. 1954); *see Ingols v. District of Columbia, supra*, 103 A.2d 879 (D.C. Mun. App. 1954).

O'Beirne v. Overholser, 109 U.S. App. D.C. 279, 287 F.2d 133 (1960).

Mr. Kleindienst referred to the fact that "wherever appropriate the language of Federal statutes or Federal rules has been used." Evidently, in borrowing the words of Section 2255 wholesale as a model for a local post-conviction remedy, the drafters of the bill borrowed language in the last paragraph that appears to reach a result that they did not intend. The government now seeks to go back and to find in that borrowed language a meaning that the language was not seen to have at the time Mr. Kleindienst testified in the Senate District Committee.

The nature of 23 D.C. Code §110 as a codification of the *Burke* case was made even clearer in a written summary of the Department's proposed bill that was handed to the Senate District Committee together with the bill. That summary characterized 23 D.C. Code §110 as follows:

> *Section 23-110* is new. Rather than relying on the inherent power of the superior court to review judgments of conviction, the new section provides statutory procedures for post-conviction challenges. Section 23-110 is modeled upon 28 U.S.C. section 2255 with only the necessary technical changes.

"Summary of Proposed Court Reorganization Act of 1969," *Hearings Before the Committee on the District of Columbia*, United States Senate, 91st Cong., 1st Sess., Part III, p. 1145 (7/15/69). Once again the Department of Justice told Congress that its proposed Section 110 simply codified a post-conviction remedy by motion in the new local courts. The Department characterized any changes from the language of the model, 28 U.S.C. §2255, as "only the necessary technical changes."

The Department's stated view of Section 110 subsequently became Congress' stated view. The language of the Department's written summary of Section 110 was carried verbatim into the Senate District Committee's report to the full Senate. S. Rep. No. 91-405, 91st Cong., 1st Sess. 38 (1969). Again the same exact description of Section 110 was picked up without change when the bill was reported to the full House of Representatives. H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 117 (1970). Since Section 110 was adopted by both houses without further debate or amendment, it appears that Congress' intention is expressed by the Department's description of its own bill.

What is missing from the legislative history is as significant as what is there. Missing is any statement that the Department of Justice thought that its bill would cut off the traditional right of prisoners who have exhausted their local remedies to seek federal constitutional review of their convictions in the Article III courts. Missing is any evidence that the Department of Justice ever told Congress that the Department's bill would have the unprecedented effect of closing the doors of the inferior Article III courts to persons convicted in the new local courts. Missing is any indication that Congress, on its own, thought that it was restricting the habeas jurisdiction of the United States District Court.[21]

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[21]The court below in this case found it particularly significant that there was no debate in Congress as to the constitutionality of 23 D.C. Code §110. 515 F.2d at 1310-11. If, as the government argues, this bill was meant to terminate the Article III habeas corpus rights of those convicted in the Superior Court, one would expect some debate as to its compatability with the constitutional prohibition against suspension of the writ. This expectation is particularly strong in view of the fact that in

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When Section 110 was pending, the Department of Justice told Congress that the section merely restated the existing law with only necessary technical changes. Congress acquiesed in that interpretation. The government now argues that in Subsection 110(g), one of those changes, far from being merely technical, has for the first time in two hundred years of constitutional history created a category of Federal prisoners who are denied review as of right in the Article III courts of their federal constitutional questions. That drastic result was not intended by Congress. Instead, the legislative history demonstrates that Congress had a different, and less radical, intention when it passed Section 110. The government's belated interpretation far exceeds Congress' intention and should be rejected by this Court.

(footnote continued from preceding page)

1968, a year before the Court Reorganization Act, and in 1973, after the Court Reorganization Act, Congress had extended and heated debates on the constitutionality of two bills that would have restricted access to federal habeas corpus. *See* 114 Cong. Rec. 11186 *et seq.* (1968); 119 Cong. Rec. 2220 *et seq.* (1973). Indeed, as one reads through the extensive hearings held on the Court Reorganization Act by Senator Tydings in his capacity as Chairman of the Senate District Committee, it strains credulity to think that he and his committee listened to days of debate about the constitutionality of the "no-knock" and "preventive detention" provisions of the Court Reorganization Bill and never raised any question about a section that would have cut off habeas corpus. Only one year earlier he had opposed on constitutional grounds a bill that would have cut off habeas corpus for state prisoners. *See* 114 Cong. Rec. 13850-67, 13990-97, 14136-37 (1968). The more reasonable explanation is that neither Senator Tydings, nor the Department of Justice, nor the Congress intended any such result.

B. Consideration of 23 D.C. Code §110 in Relation to the Legislative Pattern of the Court Reorganization Act as a Whole Indicates That Congress Did Not Intend the Drastic Result For Which the Government Argues.

In addition to the legislative history directly applicable to 23 D.C. Code §110, indications of Congress' intention may also be discerned from the pattern of the Act of which that section is a part. From the design of the Act as a whole, there emerges a clear congressional intention to emulate the relationship between the state and federal courts in regulating the relations of the two parallel court systems in the District of Columbia. *Palmore v. United States*, 411 U.S. 389, 407, 410 (1973); *Pernell v. Southall Realty*, 416 U.S. 363, 362 (1974).[22]

The Court of Appeals reasoned that if 23 D.C. Code §110 were interpreted so as to operate as a total bar to ultimate constitutional adjudication in the inferior Article III courts, then that statute would depart from the state/federal model. In the states, ultimate review of federal constitutional questions arising in the course of

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[22]The legislative history of the Court Reorganization Act is also replete with references to Congress' intention to pursue the state/federal analogy. S. Rep. 91-405, 91st Cong., 1st Sess. 1, 5, 10 (1969); H.R. Rep. No. 91-907, 91st Cong., 2d. Sess. 23, 32-35 (1970); *Statement of Managers*, 91st Cong., 2d Sess. 5 (1970); Remarks of Congressman Harsha, 116 Cong. Rec. 8098; Remarks of Congress Nelsen, 116 Cong. Rec. 8088; Remarks of Senator Baker, 116 Cong. Rec. 24740; Remarks of Senator Ervin, 116 Cong. Rec. 8918; Remarks of Congressman Hogan, 115 Cong. Rec. 7934.

state criminal prosecution is available in the federal district courts by way of habeas corpus. In the absence of evidence of a congressional intention to exempt this facet of the Act from the general state/federal analogy, the Court of Appeals read 23 D.C. Code §110 so as to harmonize it with the totality of the Act of which it is a part. If 23 D.C. Code §110 is a part of the general pattern of the Act, rather than an exception to it, then Section 110 would require no more than exhaustion of local court remedies before a person could present his federal constitutional questions to the Article III courts. This was the interpretation adopted by the Court of Appeals.

Not only did Congress not evidence any intention to take post-conviction relief out of the general state/federal pattern of the Act, it also did not amend the general habeas corpus statutes that on their face grant to the Article III District Courts the jurisdiction to hear cases such as Mr. Pressley's. The habeas corpus jurisdiction of the Article III courts is codified in Chapter 153 of Title 28 of the United States Code.[23] The general jurisdictional statute in that Chapter – 28 U.S.C. §2241 – by its terms applies to Mr. Pressley and to all others convicted in the Superior Court who allege violations of their constitutional rights.[24]

[23]Chapter 153, which is entitled "Habeas Corpus," contains a general jurisdictional statute, 28 U.S.C. §2241, procedural and evidentiary statutes, 28 U.S.C. §§2242-2253, a provision dealing with relations between the state and federal courts, 28 U.S.C. §2254, and a statutory remedy by motion, which is a substitute for habeas corpus for federal prisoners, 28 U.S.C. §2255.

[24]Mr. Pressley's case is described by 28 U.S.C. §2241(c)(1) since he is in custody by authority of the United States having (1) been prosecuted by the United States Attorney (2) for a violation of a statute passed by Congress and signed by the President (3) in a court created by Congress and (4) sentenced by a judge appointed by the President and confirmed by the Senate (5) to the custody of the Attorney General of the United States.

If, as the government argues, Congress intended to exclude persons convicted in the Superior Court from the operation of the general federal habeas statutes, then one would expect to find an amendment somewhere in Chapter 153 of Title 28 to express the exemption.[25] However, there is no amendment to Chapter 153 in the Court Reorganization Act.

The absence of any amendment to Chapter 153 is particularly significant when one considers the care with which Congress amended the balance of Title 28 of the United States Code in order to dovetail the new local courts with the Article III courts. The careful process of amendment demonstrates that Congress well knew how to fit aspects of the new court system into the state/federal analogy when it wished to. When Congress wanted to make exceptions to the state/federal analogy, the amendments creating those exceptions are clear and specific.

The congressional amendments to Title 28 fall into two groups. Where Congress was shaping the broad outlines of the new federal courts, Title 28 was amended to make the new courts fit into the federal laws in the same way the states do. So for example Congress:

[25]Of course, the simplest method would have been an amendment to 28 U.S.C. §2255 to make it apply to the new local courts. An amendment, such as "any court created by an Act of Congress, including the local District of Columbia courts," would have made Section 2255 apply specifically to the new courts and thereby filled the gap left by the 1949 amendment to Section 2255, which had been held to reach only the territorial courts. *See* Part I(A), *supra*, and *Burke v. United States, supra*, 103 A.2d 347 (D.C. Mun. App. 1954). However, an amendment to the general jurisdictional statute, 28 U.S.C. §2241, would also have been logical. In either case, an express provision "would have been easy." *Farnsworth v. Montana*, 129 U.S. 104, 113 (1889).

1) Amended Chapter 81 of Title 28 (Supreme Court) by including within the term "highest court of a State" the District of Columbia Court of Appeals thereby providing for review of local court decisions in the Supreme Court by appeal or by certiorari [*see* 28 U.S.C. §1257];

2) Amended Chapter 85 of Title 28 (District Courts; Jurisdiction) by adding a section that for the purposes of that chapter excludes from the term "laws of the United States or Acts of Congress" all laws applicable only to the District of Columbia [*see* 28 U.S.C. §1363];[26]

3) Amended Chapter 89 of Title 28 (District Courts; Removal of Cases from State Courts) by adding a section defining for the purposes of that chapter the term "State court" to include the Superior Court and the term "State" to include the District of Columbia [*see* 28 U.S.C. §1451); and

4) Amended Chapter 133 of Title 28 (Review; Miscellaneous Provisions) by defining the terms "State court(s)" and "highest court of a State" to include the District of Columbia Court of Appeals for the purposes of certain sections of that chapter dealing with procedural rules governing Supreme Court review [*see* 28 U.S.C. §2113].

On the other hand, when Congress did make exceptions to the general state/federal analogy, the exceptions concerned housekeeping matters that were

[26]This amendment was principally necessary to exclude from the federal question jurisdiction of the District Courts questions arising under the District of Columbia Code and other statutes applicable only in the District of Columbia. *See* 28 U.S.C. §1331, which is also in Chapter 85 of Title 28. 28 U.S.C. §1331 is thereby harmonized with 11 D.C. Code §§923(b)(1), 921.

different in the District of Columbia by virtue of the fact that one sovereignty had created both of the parallel court systems there.[27] So for example Congress:

1) Amended Chapter 13 of Title 28 (Assignment of Judges to Other Courts) by providing for the designation and temporary assignment of District Court judges to sit in the new Superior Court [*see* 28 U.S.C. §292(c)];[28] and

2) Amended Chapter 121 of Title 28 (Juries; Trial by Jury) by defining the term "district court" to include the Superior Court for the purposes of certain sections of the Federal Jury Act [*see* 28 U.S.C. §1869(f)].[29]

[27]The government argues that the analogy to the state/federal relationship "was not meant to be perfect." Pet. Br. 42, citing the fact that local judges are appointed by the President and confirmed by the Senate. Mr. Pressley agrees. However, his point was not that Congress created a fifty-first state but that Congress meant the relationship of the local and the federal courts to be *like* the relationship of the state and federal courts. Mr. Pressley contends that it is a fair reading of the Court Reorganization Act to say that Congress did hew to the state/federal analogy in shaping the fundamental relationship of the local and federal courts. Federal habeas corpus is an important part of that relationship in the states.

[28]This amendment harmonized the federal statute with 11 D.C. Code §908(c).

[29]This amendment harmonized the federal statute with 11 D.C. Code §§1901 *et seq.* There are other exceptions to the state/federal analogy that, since they do not affect the operation of the United States Code, are reflected only in the District of Columbia Code. For example, one prosecutor, the United States Attorney, prosecutes in both the local and the federal courts. 23 D.C. Code §101(c). The fact of a single prosecutor operating in both court systems was accompanied by a provision allowing grand juries in the District of Columbia to return indictments in either court system. 11 D.C. Code §1903.

The existence of habeas corpus review of federal constitutional questions in the Article III courts shapes one of the major aspects of the relationships between the state and federal, and of the District of Columbia and the federal courts. Neither in the legislative history, nor in the way it amended existing statutes, did Congress express any intention to alter that relationship in the District of Columbia.

This Court, in another context, has previously noted the significance of a failure in the Court Reorganization Act to amend a provision of Title 28. When Congress amended 28 U.S.C. §1257, providing for appeals to the Supreme Court by appeal and by certiorari, as noted above, it included the new District of Columbia Court of Appeals within the term "highest court of a state." But it did not include the District of Columbia Code within the term "statute of any state" in 28 U.S.C. §1257. In *Palmore v. United States*, 411 U.S. 389 (1973), this Court took note of that failure of Congress to amend the words dealing with statutes. Pointing to the care with which the Court Reorganization Act amended Title 28 where appropriate, the *Palmore* Court held that Congress had not intended decisions of the District of Columbia Court of Appeals upholding the constitutional validity of District of Columbia Code provisions to proceed into this Court by way of appeal. 411 U.S. at 394-5.[30]

[30]*See also District of Columbia v. Carter*, 409 U.S. 418 (1973), where in another context Congress' failure to specifically include the District of Columbia within the term "any State or Territory" as used in 42 U.S.C. §1983 was taken as evidence of a lack of congressional intent to make that statute apply in the District of Columbia.

The placement of the language at issue here solely in the District of Columbia Code contradicts the government's thesis. The government argues that 23 D.C. Code §110(g)[31] was meant to close the doors of the Article III courts all across the country to the habeas corpus petitions of Superior Court prisoners no matter where those prisoners happen to be confined. Pet. Br. 47-48.[32]

[31]In this regard, the government relies on the following words in Subsection 110(g): "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained . . . by any Federal . . . court. . . ."

[32]This government argument—that under the Court of Appeals' interpretation of Section 110 Superior Court prisoners who are incarcerated outside the District of Columbia will be able to attack their convictions in District Courts all over the country—is a scare argument. The Court of Appeals' opinion in Mr. Pressley's case demonstrates that the Article III courts in the District of Columbia recognize their responsibility to hear the habeas claims of Superior Court prisoners who, like Mr. Pressley, are confined outside the District of Columbia. As for the Article III courts outside the District of Columbia, they are equipped with adequate procedural machinery to insure that habeas claims are litigated in the most appropriate forum. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *e.g., Eisel v. Secretary of the Army*, 155 U.S. App. D.C. 366, 477 F.2d 1251 (1973); *Reese v. Board of Parole*, 162 U.S. App. D.C. 156, 498 F.2d 698 (1974); *Starnes v. McGuire*, 168 U.S. App. D.C. 4, 512 F.2d 918 (1974) (*en banc*). *See also Wright v. Jackson*, 505 F.2d 1229 (4th Cir. 1974) (Prison conditions habeas corpus filed from Lorton Reformatory in the Eastern District of Virginia transferred to the District of Columbia on *forum non conveniens* grounds). Counsel for Mr. Pressley has been informed by the Clerk of the United States District Court for the Eastern District of Virginia that habeas corpus petitions filed in that court by Superior Court prisoners confined in the Reformatory at Lorton, Virginia, attacking the legality of their sentences are routinely referred to the United States District Court for the District of Columbia.

And yet, if the intention of Congress were to bar entry to all of the nation's Article III courts, placement of this would-be jurisdictional bar in a section granting power to the new local courts contained in a remote corner of the District of Columbia Code seems odd. It would have been more reasonable to expect placement of this jurisdictional prohibition, if that was what it were, in the United States Code where it would be in proximity to the general jurisdictional grant and more likely to come to the attention of the District Courts outside the District of Columbia.

Congress' failure to place any jurisdictional prohibition among the general federal habeas corpus statutes is but one more link in a chain that evidences Congress' lack of intention to intrude upon the traditional habeas corpus jurisdiction of the Article III courts. More than that, absent an express amendment to Title 28, the government is forced to ask this Court to imply an amendment, despite the lack of congressional intent to accomplish such as change. Since there is no express repeal of the Article III courts' habeas jurisdiction in the United States Code, the government is left with arguing that this Court is faced with two congressional enactments – the general habeas corpus statute, 28 U.S.C. §2241, and the local post-conviction remedy statute, 23 D.C. Code §110 – one of which partially repeals the other by implication.

However, "when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The exhaustion interpretation given to 23 D.C. Code §110 by the Court of Appeals demonstrates that these two statutes can

coexist. Courts particularly disfavor implied repeals of the sort urged by the government because where the intention of Congress to repeal is not absolutely clear, the court may be drawn into resolving statutory conflicts that are more apparent than real, and Congress' actual intention may ultimately be defeated. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 549 (1972); *Jones v. Mayer Co.*, 392 U.S. 409, 437 (1968); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

The implied repealer argued for by the government is no mere technical change. It would take away the jurisdiction of the Article III courts to hear habeas corpus petitions for one of the classes of persons confined by the United States government – persons convicted in the local District of Columbia courts. That jurisdiction has been continuous and undisturbed since 1789.[33] As this Court said in *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975):

> As we had occasion recently to repeat, "repeals by implication are disfavored," and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-36 (1974).

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[33]The jurisdiction of the inferior Article III courts to hear habeas corpus petitions filed by persons "in custody under or by color of authority of the United States" came into our law as part of Section 14 of the Federal Judiciary Act of 1789, 1 Stat. 73, 82, and has survived repeated recodification intact as 28 U.S.C. §2241(c)(1). Mr. Pressley is in custody by authority of the United States. See footnote 24, *supra*.

Mr. Pressley suggests that the Court of Appeals' interpretation achieves the goal that this Court articulated in another context in *Ozawa v. United States*, 260 U.S. 178, 194 (1922):

> It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result, plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment, and inquire into its antecedent history, and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. (Citations omitted.) We are asked to conclude that Congress, without consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability, of so fundamental a change, nevertheless, by failing to alter the identifying words (of the statute in question), which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the government – a part of our history as well as our law, welded into the structure of our national policy, by a century of legislative and administrative acts and judicial decisions – would have been deprived of its force in such dubious and casual fashion.[34]

Seen in this light, it is clear that the government has distorted the significance of the fact that the words of 23 D.C. Code §110 are borrowed from the general remedy-by-motion section that applies to all persons convicted in the Article III courts, 28 U.S.C. §2255.

[34] *See Panama R.R. Co. v. Johnson*, 264 U.S. 375, 384 (1924).

Pet. Br. 42-46. While it cannot be doubted that words of the two statutes are largely the same, it does not follow that their purposes must be the same. Dealing with like words used in different parts of the same statute, this Court said in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932):

> Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning . . . But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent. Where the subject matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning may well vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed. (Citations omitted.)

What this Court said about identical language used in different parts of the same act should apply here *a fortiori* to similar language used in two different enactments.

When the language the Congress used in 28 U.S.C. §2255 and in 23 D.C. Code §110 is examined in the two differing contexts in which it was used, the government's insistence on mechanical adherence to literalism fails for two reasons: first, because the purpose of Section 2255 is irrelevant to the District of Columbia; and second, because the legislative history

shows that the purpose of Section 110 was quite different from that of Section 2255. A closer, more thorough, look at Section 110 shows that its proper purpose is much more like Section 2254, which governs the relations between state and federal courts on habeas, than Section 2255.

The purpose of Section 2255 was reviewed extensively in *United States v. Hayman*, 342 U.S. 205 (1952). Before 1948, the sole method of collateral attack upon federal criminal convictions in the Article III courts was by habeas corpus under 28 U.S.C. §2241. Under traditional law, habeas corpus had to be brought in the district where the prisoner was confined. *Ahrens v. Clark*, 335 U.S. 188 (1948). This had led to a disproportionate case load in some federal district courts. The five districts in which the large federal prisons were located were swamped with habeas corpus cases while the seventy-nine other districts had almost none. The case load was thus distributed without regard for the size and capacity of the various district courts, and habeas cases, which were generally nothing more than collateral attacks on convictions, were often heard in districts located thousands of miles from the place of the trial. Speck, *Statistics in Federal Habeas Corpus*, 10 Ohio St.L.J. 337 (1949).

To rectify these anomalies, Congress enacted 28 U.S.C. §2255. The new statute eliminated the right of federal prisoners to challenge their convictions in the districts where they were confined and replaced that right with a procedure by which prisoners were required to collaterally attack their convictions by motion in the courts in which they had been convicted. By this means, Congress redistributed the habeas corpus business of the Article III courts and ensured that the

various district courts disposed of collateral attacks in proportion to the number of convictions that they produced. *See United States v. Hayman*, 342 U.S. 205, 213-19 (1952); Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 174-75 (1948).

The problem of skewed distribution of post-conviction cases was not posed in the District of Columbia. Section 2255 already operates to ensure that the District Court handles all the post-conviction work generated by criminal convictions in that court. As to cases coming from the local courts, the habeas corpus burden would be entirely analogous to the burden in other District courts imposed by writs filed by state prisoners. Thus, though language similar to that in Section 2255 was used, the purpose of Section 110 was different. When one examines the legislative history of Section 110, discussed above, one observes that Congress' purpose was affirmatively stated to be the codification of the Superior Court's jurisdiction over a motion collaterally attacking a conviction. Such a motion had previously existed only by virtue of the inherent common law power of the local courts in the District of Columbia. Thus, the whole of Section 110 is properly seen as a codification of a simplified alternative to traditional habeas corpus.[34a]

[34a] The remedy by motion is simpler and more expedient than the habeas corpus procedure, which begins with the establishment of a separate civil case founded upon service of process. The steps in a habeas case—petition, response, rule to show cause, return, traverse, hearing and issuance of writ—are considerably more complex than the simple 2255-type motion made in the context of the underlying criminal case. Thus 23 D.C. Code §110 has a purpose quite separate and distinct from the new local habeas corpus statute. 16 D.C. Code §§1901 *et seq.*

When Subsection 110(g) in particular is seen against the backdrop of Congress' repeatedly expressed intention to create two parallel court systems akin to the state and federal courts within each state, then its purpose too becomes clear. Since there is no separate legislative history for Subsection 110(g), a reasonable place to look for its meaning is to the comparable statute that governs the relations between the state and federal courts outside the District of Columbia. That statute is 28 U.S.C. §2254. Subsections 2254(b) and (c) require exhaustion of state remedies before resort to the Article III courts for ultimate constitutional adjudication. *Brown v. Allen,* 344 U.S. 443, 450 (1953). The Court of Appeals found 23 D.C. Code §110(g) embodied the same requirement in the District of Columbia: local court remedies must be exhausted before resort may be had to a writ of habeas corpus in the Article III courts. 515 F.2d at 1313. In doing so, the Court of Appeals did not content itself with a superficial reference to where Congress found the words it used.[35] Instead, the court looked at the purposes of Subsection 110(g) in order to ascertain how it fit into Section 110 and the Act as a whole.

[35]Though not mentioned in the government's brief, there are several subsections of 23 D.C. Code §110 that the government would presumably be prepared to admit cannot be read literally. See footnotes 62 and 65, *infra.* There are also some implications of a literal reading of Subsection 110(g) that the government would presumably be reluctant to espouse. See footnote 65, *infra.* The logical force of a rule of interpretation that, like literalism, can only be applied selectively to certain subparts and certain parts of subparts, all without apparent pattern, is dubious.

C. This Court Has Always Interpreted Statutes That Arguably Cut Back On Habeas Corpus In The Article III Courts So As To Protect The Traditional Habeas Corpus Jurisdiction Of The Article III Courts.

In the past in a series of cases, the government has argued to this Court that statutes referring to collateral attack in non-Article III courts operated to the exclusion of habeas corpus in the Article III courts. In all of those cases, this Court has found that the questioned statutes required no more than exhaustion of non-Article III remedies before resort to habeas corpus in the Article III courts would be allowed. The Court has reached this result because it did not find that Congress intended the language it had used to intrude into the as-yet uncharted area of the Suspension Clause of the Constitution.[36]

The case that is most closely analogous to the present case is *Brown v. Allen,* 344 U.S. 443 (1953). The statutory backdrop of the *Brown* case was quite similar to the case now before the Court. In 1948, Congress had passed 28 U.S.C. §2254(c), which read

[36]"The Privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it." *U.S. Const.* art. I, §9, cl. 2. Because this Court has never felt itself faced with a direct restriction on the writ of habeas corpus, the precise parameters of the "privilege" protected by the Suspension Clause have never been defined. "The suspension clause, so simple in appearance, is fraught with confusion. Those few cases which have dealt with it provide little interpretative guidance; commentators have largely ignored it. Consequently, conclusions in this area must be tentative." Note, *Developments in the Law–Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1263 (1970).

literally would have closed the doors of the inferior Article III courts to any state prisoner who had any form of remedy still available to him in the state courts. The language in question in 28 U.S.C. §2254(c) was:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, *by any available procedure*, the question presented. (Emphasis added.)

These words appeared to mean that in any state that allowed successive habeas corpus filings, and many states did, the federal courts were permanently closed to state prisoners because their state remedies were "inexhaustible."[37]

All nine justices of the *Brown* Court, badly divided as they were on the other procedural issues and on the merits, agreed that Section 2254(c) would not be construed to close the Article III courts to habeas petitioners whose state remedies were inexhaustible. Mr. Justice Reed, writing for the entire court on this point, found that there was no legislative history explaining why Congress had passed the particular subsection in

[37]There was evidence that the authors of this language intended it to have the effect of foreclosing federal habeas corpus to large numbers of state prisoners. The Honorable John J. Parker, Chief Judge of the Fourth Circuit and Chairman of the Judicial Conference Committee that drafted the language, had written an article saying that restriction of access to the federal courts was exactly the purpose of this section. Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 176 (1949). The *Brown* opinion acknowledged the intentions of the authors by quoting Judge Parker at 344 U.S. at 448, n. 3. After quoting Judge Parker, the footnote continues "we do not so construe §2254. We do not believe Congress intended to require repetitious applications to state courts."

question, 28 U.S.C. §2254(c).[38] He then turned to the Act as a whole and concluded that a literal reading of Section 2254(c) would put that subsection out of harmony with the rest of the Act. He concluded:

> We are unwilling to conclude without a definite congressional direction that so radical a change was intended. 344 U.S. at 450.[39]

That is the rule that Mr. Pressley invokes in his case. He asks this Court not to find an unprecedented restriction of the right to federal habeas corpus in a statute that would achieve that restriction by a curiously indirect route where Congress demonstrated no such purpose.

In the *Brown* case, this Court did what it had done several times before in American legal history: it avoided the Suspension Clause question by construing a statute that arguably restricted access to the Article III courts on a writ of habeas corpus so that the statute required nothing more than exhaustion of non-Article III remedies. For instance, in *Gusik v. Schilder*, 340 U.S. 128 (1950), the Court was faced with a statute very much like 23 D.C. Code §110. In the *Gusik* case, Congress had legislated for the military courts, which like the new local District of Columbia courts, were

[38]Contrast the legislative history of 23 D.C. Code §110, which affirmatively indicates a purpose to codify the common law power of the local District of Columbia courts to entertain collateral attack. *See* Part I(A) of this brief, *supra*.

[39]28 U.S.C. §2254(c) remains in the code today, but continues to be interpreted to require that a state is entitled to no more than one "full opportunity to determine the federal constitutional issues before resort . . . to a federal forum." *Francisco v. Gathright*, 419 U.S. 59, 63 (1974).

created pursuant to Congress' Article I powers. *U.S. Const.* art. I, §8, cl. 14. The statute at issue in *Gusik* created a right to post-conviction collateral attack within the military justice system and provided that such collateral proceedings were "final and conclusive" and "binding upon *all* departments, *courts*, agencies, and officers *of the United States.*[40]" (Emphasis added.)

Since a very early date, final judgments of the Article I military courts had been reviewable by habeas corpus in the Article III courts. *Wise v. Withers*, 7 U.S. (3 Cranch) 331 (1805);[41] Ex parte *Reed*, 100 U.S. 13 (1879); *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Toth v. Quarles*, 350 U.S. 11 (1955).[42] But the petitioner in the *Gusik* case argued that the statute was an unconstitutional suspension of the writ because it cut off habeas review in the Article III courts since as "courts of the United States," they would be bound by the disposition made by the Article I military courts. The *Gusik* court declined this invitation to needless

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[40]62 Stat. 639; then codified as 10 U.S.C. §1525; now substantially contained in 10 U.S.C. §873.

[41]The form of the action was trespass, but the concept was clearly habeas corpus. Ex parte *Watkins*, 28 U.S. (3 Pet.) 193, 208-9 (1829); *McClaughry v. Deming*, 186 U.S. 49, 68-69 (1902).

[42]Both the *O'Callahan* and *Toth* cases were cited by this Court in *Palmore v. United States*, 411 U.S. 389, 404 (1973), for the proposition that cases involving violations of United States statutes can constitutionally be tried in Article I courts. For the purposes of the present case, *O'Callahan* and *Toth*, which are both habeas corpus cases, demonstrate the role of the Article III courts as the ultimate arbiters of federal constitutional questions that arise in the course of criminal trials in Article I courts.

constitutional adjudication and held instead: "We read the finality clause of [10 U.S.C. §1525] as doing nothing more than describing the terminal point for proceedings within the court-martial system." 340 U.S. at 132. In short, the *Gusik* Court read that statute as an exhaustion statute just as the Court of Appeals read 23 D.C. Code §110 in Mr. Pressley's case.[43]

The Court's reasoning in *Gusik* stood on the ground that in the statute there at issue Congress had been legislating for the courts-martial, not the Article III courts. The same, of course, is true of the Court Reorganization Act, which regulates the local courts, not the national courts. Pointing to the traditional habeas jurisdiction of the Article III courts to review the judgments of the Article I courts-martial, the *Gusik* court concluded:

> If Congress had intended to deprive the civil courts of their habeas corpus jurisdiction, which has been exercised from the beginning, the break with history would have been so marked that we believe the purpose would have been made plain and unmistakable. 340 U.S. at 132-33. (Footnote omitted.)

Mr. Pressley submits to this Court that, measured by that standard, Congress has not evidenced a "plain and unmistakeable" purpose to break with two hundred years of history during which Article III habeas corpus has been available to persons convicted in the District of Columbia courts.

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[43]Subsequent codifications of the *Gusik* statute continue to be interpreted as requiring no more than exhaustion of military court remedies as a prerequisite to Article III habeas corpus. *United States v. Augenblick*, 393 U.S. 348 (1969).

Another example of how this Court has chosen to read statutes that might bar access to Article III habeas corpus can be traced out from the turgid history of the immigration statutes. In the early history of the United States, there were virtually no laws governing immigration. However, beginning in 1875, immigration to this country was increasingly restricted by statute. This trend culminated in the Chinese Exclusion Act of 1882.[44]

In the case of *United States v. Jung Ah Lung*, 124 U.S. 631 (1888), this Court was faced with a claim that the Chinese Exclusion Act was intended to restrict the habeas corpus jurisdiction of the district court. The Act stated clearly that decisions concerning the status of immigrants were to be made by the collector of the port. The statute contained no reference to any judicial review. This, it was argued, amounted to a repeal of the federal courts' traditional habeas corpus jurisdiction. But the Court brushed this suggestion aside saying:

> But we regard this as only a provision for specifying the executive officer who is to perform the duties prescribed, and that no inference can be drawn from that or any other language in the Acts that any judicial cognizance which would otherwise exist is intended to be interfered with. 124 U.S. at 632.

[44]Act of May 6, 1882, ch. 126, 22 Stat. 58.

Five years later the Court was faced with two statutes that were even more definite.[45] These two statutes could have been read to bar intervention by the Article III courts where a person was detained by the immigration authorities. But in The Japanese Immigrant Case (*Yamataya v. Fisher*), 189 U.S. 86 (1903), the Court held that habeas corpus was an implied exception to both statutes. In justification of its reading of the statutes, this Court said:

> This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute,

[45]The first provided:

> All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. 26 Stat. 1085.

The second statute was as follows:

> In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decisions of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. 28 Stat. 372, 390.

arbitrary power implied in the contention of the appellant. 189 U.S. at 100.[46]

The immigration cases, together with *Brown* and *Gusik*, show that this Court has declined to interpret any statute so that it would interfere with the traditional jurisdiction of the Article III courts to test the legality of detentions by habeas corpus. Mr. Pressley urges this court to do no less when interpreting 23 D.C. Code §110(g).[47]

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[46]*Chin Yow v. United States*, 208 U.S. 8 (1908) (Holmes, J.) is to the same effect. There the Court admitted that the determination to be made by the executive officers under those statutes was meant to be the exclusive mode of settling the rights of the immigrant. Nevertheless, confronting the claim of an immigrant who claimed to have been denied an adequate hearing, the Court said:

> The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. 208 U.S. at 12.

The development of the law in this area was not in a straight line. *See* The Chinese Exclusion Case (*Chae Chan Ping v. United States*), 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895). But ultimately *Yamataya, supra*, and *Chin Yow, supra*, settled the question in favor of Article III habeas corpus and the result was codified in 1956 as 8 U.S.C. §1105(a).

[47]*See also Sanders v. United States*, 373 U.S. 1 (1963), where the Court declined to read the words of 28 U.S.C. §2255 literally because to do so would be to "derogate from the traditional liberality of the writ of habeas corpus" thereby raising

(continued)

II.

IF THIS COURT WERE TO CONCLUDE THAT CONGRESS DID INTEND 23 D.C. CODE §110 TO BE A SUBSTITUTE FOR THE TRADITIONAL FEDERAL HABEAS CORPUS REMEDY OF PERSONS CONFINED BY THE UNITED STATES, THE STATUTE WOULD BE AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT BECAUSE IT SUBSTITUTES A REMEDY THAT IS NOT "EXACTLY COMMENSURATE" WITH HABEAS CORPUS IN THE ARTICLE III COURTS.

The government argues that Congress intended the remedy provided by 23 D.C. Code §110 to be a complete substitute for the privilege of the writ of habeas corpus that prisoners of the non-Article III District of Columbia courts had always enjoyed previously. Mr. Pressley has argued in Part I that Congress never had any such intention. But if this Court should find that 23 D.C. Code §110 in fact does

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(footnote continued from preceding page)

"the gravest constitutional doubts." *Also United States v. Hayman*, 342 U.S. 205 (1952), reading into 28 U.S.C. §2255 the prisoner's right to be present at his post-conviction motion hearing in order to avoid any constitutional problem that would have been raised by cutting back on the traditional right of a habeas petitioner to be present at his hearing. These two cases are discussed more fully in Part II of this brief, *infra*. The government suggests that this Court ought to read statutes only so as to avoid plainly unconstitutional results. Pet. Br. 31-32. But the rule is that "(a) statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

have the effect the government argues for, then Mr. Pressley maintains that the statute unconstitutionally suspends the writ of habeas corpus, which has always been available to persons in the custody of the United States. The substitution is unconstitutional because the remedy provided is not "exactly commensurate" with the right taken away.

This Court has never found itself confronted with a statute that substituted a remedy in a non-Article III forum for habeas corpus in the Article III courts. As a result, there are no decided cases that settle the question whether Mr. Pressley has a right to be heard in the Article III courts. But Mr. Pressley argues that persons like himself who are confined by the authority of the United States have an absolute right to ultimate adjudication of their federal constitutional claims in the Article III courts, and that this right is protected by the Suspension Clause of the Constitution.

From the beginnings of our government to today, when a person has been deprived of his liberty by the power of the United States, the Article III courts have always been available to test the constitutionality of that confinement, whether the confinement was ordered by an Article III or a non-Article III authority. In Anglo-American jurisprudence, due process of law is the *sine qua non* of deprivation of liberty. Habeas corpus, which searches out the lack of due process, is therefore co-terminus with the government's power to confine.

Mr. Pressley recognizes that this Court has held that substitutes for habeas corpus are constitutionally permissible. The test for determining what amounts to a constitutionally acceptable substitute under the Suspension Clause is whether the substituted remedy is "exactly commensurate" with the remedy traditionally

available by way of federal habeas corpus. Since the only substitute for habeas corpus approved by this Court to date–the remedy by motion provided in 28 U.S.C. §2255–was itself a remedy in an Article III court, this Court has not specifically decided the question whether a substituted remedy in a court created pursuant to Article I can constitutionally replace the traditional habeas corpus remedy, which is, and has always been, in the Article III courts.

Mr. Pressley submits that the new local Article I courts in the District of Columbia are fundamentally different from the federal Article III courts. The salary and life tenure of the Article III judges are constitutionally protected, guaranteeing those judges a degree of independence that is unique. On the other hand, Congress, exercising its Article I powers, did not extend salary and tenure protections to the judges of the new courts in the District of Columbia and those judges are therefore more responsive to the parochial concerns of their locality.

The difference between a court manned by judges whose independence is protected by the Constitution and a court whose judges are more dependent on the popular will is fundamental. Mr. Pressley therefore argues that any substitute remedy in the Article I courts would not be "exactly commensurate" with his traditional habeas corpus remedy in the Article III courts and, accordingly, would be an unconstitutional suspension of the writ of habeas corpus.

A. The Suspension Clause Enjoins Congress to Extend the Privilege of the Writ of Habeas Corpus to All Persons Confined by Authority of the United States.

Mr. Pressley was confined by the authority of the United States. He was prosecuted in the name of the United States by the United States Attorney for a crime defined by an act of Congress in courts created by Congress and sentenced to the custody of the Attorney General of the United States.[48]

The first Congress of the United States empowered the inferior Article III courts to inquire into the legality of the detention of every person who was "in custody under or by color of authority of the United States." Section 14, Federal Judiciary Act of 1789, 1 Stat. 73, 82. Those words, which have survived every intervening recodification and appear verbatim in 28 U.S.C. §2241(c)(1), have been re-enforced by nearly two hundred years of legal history.

The first Congress, which included many of the framers of the Constitution, was legislating in light of its view of what the Suspension Clause required. As Mr. Chief Justice Marshal said in Ex parte *Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807):

> for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ of any of the courts of the United States, must be given by written law. . . .

[48]The nature of his confinement is not changed by the fact that the petitioner is an employee of the District of Columbia. The District of Columbia government is a creature of the United States Constitution, *U.S. Const.* art. I, §8, cl. 17, and possesses only those powers granted to it by Congress.

> It may be worthy of remark, that [the Federal Judiciary Act of 1789] was passed by the first Congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."
>
> Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of habeas corpus.[49] 8 U.S. at 95.

[49]Chief Justice Marshall's point was repeated by this Court 156 years later in *Jones v. Cunningham*, 371 U.S. 236, 238 (1963):

> The habeas corpus jurisdictional statute implements the constitutional command that the writ of habeas corpus be made available. (Footnote omitted.)

See also Ex parte *Yerger*, 75 U.S. (8 Wall.) 85, 95 (1869); *United States* ex rel. *Turner v. Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring); *McNally v. Hill*, 293 U.S. 131, 135 (1934). Apart from the habeas corpus jurisdiction, in other cases concerning the lower federal courts and the appellate powers of the Supreme Court, Congress has power to modify the jurisdictional framework, *Whitney v. Dick*, 202 U.S. 132 (1906); Ex parte *McCardle*, 74 U.S. (7 Wall.) 506 (1869), but it must do so consistent with the Constitution. Hart & Wechsler, *The Federal Courts and the Federal System*, 317-40, particularly 335-40 (1953 3d ed.). The possibility that Congress might refuse to create any lower federal courts at all under Article III is irrelevant to the question before this Court. The question here is, "Having created lower federal Article III courts, can Congress divest them of their habeas corpus jurisdiction?" One scholar has

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The habeas corpus power of the Article III courts, which was established by the first Congress, acting under the constitutional obligation imposed by the Suspension Clause, has not been disturbed by any subsequent congress.[50]

Over the years, the phrase "by authority of the United States" has continually been interpreted so that the habeas corpus power of the inferior Article III courts reaches not only those prisoners confined by the Article III courts themselves, but also persons confined by all other manifestations of the power of the United States, including:

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answered the question this way: "There must, to be sure, be courts legislatively created before the writ of habeas corpus can be employed. But having established Federal courts Congress would be powerless to deny the privilege of the writ. Otherwise Article I, section 9 would be reduced to a dead letter. The Constitution does not merely prohibit suspension of habeas corpus acts, or of the writ, but of "the privilege of the writ," a privilege long antedating the codification and reforms embodied in English statutes of the seventeenth century. . . ." Brief of Paul A. Freund, Assigned Counsel for Respondent, *United States v. Hayman*, 342 U.S. 205 (No. 23, October Term, 1951), p. 29. Professor Freund's brief has itself become an authority on the subject, having been cited in *Fay v. Noia*, 372 U.S. 391, 404, n. 13, 405 n. 15 (1963); *Sanders v. United States*, 373 U.S. 1, 13 n. 7 (1963); and Note, *Developments in the Law–Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1269 n. 42 (1970).

[50]This case does not present the issue of whether persons held other than by the authority of the United States also have a right of access to Article III habeas corpus that is protected by the Suspension Clause.

1) *Military Prisoners.* The writ is available in the Article III courts to military court defendants, *Burns v. Wilson*, 346 U.S. 137 (1953); persons inducted into the armed forces, *Oestereich v. Selective Service*, 393 U.S. 233, 235 (1968); and reservists ordered to active duty, *Linsalata v. Clifford*, 290 F.Supp. 338 (S.D.N.Y. 1968).[51]

2) *Immigration and Naturalization Detainees.* The writ in the Article III courts reaches not only citizens but also aliens about to be deported, *Ng Fung Ho v. White*, 259 U.S. 276 (1922), and aliens seeking entry into this country. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

3) *Indian tribal court prisoners. Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).[52]

4) *Persons committed to federal mental hospitals. Stewart v. Overholser*, 87 U.S. App. D.C. 402, 186 F.2d 339 (1950).

5) *Persons subject to interstate extradition proceedings.* Prisoners held by virtue of Article IV, §2, cl. 2 of the United States Constitution, no matter in what court, may be heard in the Article III courts on habeas corpus. *Roberts v. Reilly*, 116 U.S. 80 (1885).

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[51]Nationals of hostile countries seized in time of war who are detained outside the United States by force of international law are not entitled to Article III habeas corpus. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

[52]This particular jurisdiction is now separately codified. 25 U.S.C. §1303.

6) *Persons confined on account of contempt of Congress. Jurney v. McCracken*, 294 U.S. 125 (1935).[53]

[53]Before the Court Reorganization Act, persons tried and convicted in the non-Article III courts in the District of Columbia could resort to the Article III courts on habeas corpus. *O'Beirne v. Overholser*, 109 U.S. App. D.C. 279, 287 F.2d 133 (1960) (Defendant tried in General Sessions and found not guilty by reason of insanity). In *Palmore v. United States*, 411 U.S. 389 (1973), this Court re-emphasized the necessity of an Article III court being available in the District of Columbia—not for criminal trials, but for "constitutional and statutory matters of general concern," a phrase that includes local prisoners' federal constitutional rights. Palmore had argued to the Court that *O'Donoghue v. United States*, 289 U.S. 516 (1933), compelled the conclusion that Article III courts were indispensable for the trial of felonies in the District of Columbia. 411 U.S. at 406. In *O'Donoghue*, this Court had examined the old District of Columbia Supreme Court and concluded that it was an Article III court whose judges' salaries could not be diminished. Mr. Justice White, writing for eight justices in *Palmore*, responded to Palmore's argument *inter alia* as follows:

> We cannot agree that *O'Donoghue* governs this case. The District of Columbia Courts there involved . . . were the only courts within the District in which District inhabitants could exercise their "right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. III." (Quoted from *O'Donoghue*, 289 U.S. at 540.)
>
> The case before us is a far cry from *O'Donoghue*. Here Congress has expressly created two systems of courts in the District. One of them is made up of the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, which are constitutional courts manned by Article III judges to which the citizens of the District must or may resort for consideration of those constitutional and statutory matters of general concern which so moved the Court in *O'Donoghue*. 411 U.S. at 405-407. [Footnotes omitted.]

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The extended reach given the writ by the decisions of this and other federal courts is consistent with the very nature of habeas corpus. It is unique in the

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Prisoners of the territorial courts are also held by authority of the United States. However, the role of the Suspension Clause in the territories is somewhat uncertain. There are two classes of territories—incorporated and unincorporated—the former being those destined for statehood. The distinction turns upon the intention of Congress. Except for certain fundamental aspects of personal liberty, the Constitution does not apply *ex proprio vigore* in the unincorporated territories. *Insular Cases*, 182 U.S. 1 (1901). The Suspension Clause, which deals with a legal form peculiar to our Anglo-Saxon jurisprudence, probably does not apply in the unincorporated territories. The question does not appear to have been decided. However, the writ has consistently been extended to the unincorporated territories by legislative or executive grace. *E.g.*, 48 U.S.C. §§1421b (Guam), 1406g (Virgin Islands). *See also* Art. I, §7 of the Revised Constitution of American Samoa, ratified by the Secretary of the Interior pursuant to Executive Order No. 10264. If the writ extends to the unincorporated territories as a matter of grace, and not by constitutional compulsion under the Suspension Clause, then there need not be ultimate access as a matter of right to the Article III courts. The government points out that at present, 28 U.S.C. §2255 places the post-conviction relief in the territories in their Article I courts. Pet. Br. 61 n. 31. But there are no incorporated territories at this time. Alaska and Hawaii, the two last incorporated territories, were admitted to statehood in 1959. Before 1959 in Alaska, Hawaii, and several other incorporated territories, there were no Article III courts. For instance, the United States District Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), was a non-Article III District Court. But from the Northwest Ordinance of 1787 up to the more recent organic acts, there has always been provided some sort of access as a matter of right to the Article III courts. In the earlier acts, this access was by writ of error to this Court. In the later acts, it was by appeal to the circuit courts of appeals, as in the cases of

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constitutional scheme. It is the only power presumed to be inherent in the federal government without constitutional grant. The Suspension Clause does not grant the power of issuing the writ but protects against interference with a privilege that is assumed to exist. Indeed some of the authors of the Constitution thought that the most effective way to protect the writ was simply not to mention it at all. Silence, they thought, would make it clear that the government had no power to interfere with it.[54]

The constitutional assumption that habeas corpus exists and needs only to be protected from suspension is appropriate. Habeas corpus is a power which inheres in the existence of common law courts and in the guarantee of due process of law. Once the concept of

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Hawaii and Alaska. The government suggests that access to an Article III appellate court is not the same as having an Article III trial court available for habeas corpus. Pet. Br. 61, n. 31. The difference between an appellate court and a trial court for habeas corpus was minimal before this Court decided *Townsend v. Sain*, 372 U.S. 293 (1963), providing for fact-finding hearings in habeas corpus cases. Of course, the two last incorporated territories had been admitted to statehood in 1959. Whatever the case may be in the unincorporated territories alluded to by the government, it is clear that the Constitution applies fully in the District of Columbia. *Capitol Traction Co. v. Hof*, 174 U.S. 1 (1899); *Downes v. Bidwell*, 182 U.S. 244, 261-62 (1901).

[54]*The Federalist, No. 84* at 534-536 (Lodge ed. 1908); 3 Farrand, *Records of the Federal Convention* 297-298 (1911); *United States* ex rel. *Wheeler v. Williamson*, 28 Fed. Cas. No. 16,726 at 688 (E.D. Pa. 1855); Rawle, *A View of the Constitution* 118 (2d ed. 1829); Chafee, *The Most Important Human Right in the Constitution*, 32 B.U.L. Rev. 143, 144 (1952); Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace?*, 40 Calif. L. Rev. 335, 341-45 (1952).

due process exists–and it has existed in Anglo-American law since Magna Carta–then in a society that values liberty, there is no judicial function more fundamental than inquiry into the legal basis of confinement.[55] The writ has become the inevitable common law counterpoint to the government's power to confine.[56] If citizens can be confined only after due process of the law, then habeas corpus must exist to search out the lack of due process.

B. Substitutes for Federal Habeas Corpus Are Permissible But Only When the Substituted Remedy Is "Exactly Commensurate" With the Traditional Habeas Corpus Remedy.

This Court has approved a remedy substituted for the traditional habeas corpus remedy in the Article III courts. That substitute is 28 U.S.C. §2255, which provides a remedy by motion in the same Article III court in which the prisoner was convicted.[57] Different

[55]With characteristic hyperbole, Dr. Johnson told Boswell: "The *Habeas Corpus* is the single advantage our government has over that of other countries." Boswell, *Life of Johnson* 382 (3d ed. 1799). Blackstone said that the act of Parliament guaranteeing habeas corpus "is frequently considered as another Magna Carta." 3 Bl. Com. 135. In the United States, the writ has been held to be equally valuable. *Smith v. Bennett*, 365 U.S. 708, 712-13 (1961); *Bowen v. Johnston*, 306 U.S. 19, 26 (1939); *Brown v. Allen*, 344 U.S. 443, 554 (1953) (Black, J., dissenting.)

[56]*Ng Fung Ho v. White*, 259 U.S. 276 (1922) (Brandeis, J.).

[57]Mr. Pressley is aware that in the territories, the Section 2255 remedy by motion is in an Article I court. However, since the Suspension Clause applies in the current unincorporated territories only by legislative grace, the legislature is free to subtract from the protections that it chooses to extend. See footnote, 53 *supra*.

aspects of the Section 2255 remedy have been examined repeatedly by this Court.

From the cases in which this Court has examined Section 2255, a constitutional test has emerged. In order to avoid possible conflict with the Suspension Clause, Section 2255 must be read so as to provide a prisoner with the same full range of rights on his motion that he would have had on his traditional petition for habeas corpus. Any provision that appears to make the Section 2255 motion less than "exactly commensurate" with traditional federal habeas corpus must be read so as to guarantee the prisoner the full remedy previously available in order to avoid engendering serious constitutional doubts.

The words "exactly commensurate" first appeared in the case of *Hill v. United States*, 368 U.S. 424 (1962).[58] The *Hill* court summarized the history of 28 U.S.C. §2255 and the first Supreme Court opinion dealing with the statute, *United States v. Hayman*, 342 U.S. 205 (1952), as follows:

> ...it conclusively appears from the historic context in which §2255 was enacted that the legislation was intended simply to provide in the sentencing court a remedy exactly commensurate with that which has previously been available by

[58]The *Hill* case illustrates the proposition that while the Suspension Clause defines the minimum that Section 2255 must encompass (*i.e.*, no less than habeas corpus), as a matter of statutory interpretation, this Court has found that Congress intended Section 2255 to encompass no more than traditional habeas corpus had. Hill had been denied his opportunity to allocute at the time of sentence. Since habeas corpus would not have been available to attack this procedural error, Section 2255 was held to afford Hill no greater remedy. *See Heflin v. United States*, 358 U.S. 415 (1959).

> habeas corpus in the court of the district where the prisoner was confined. 368 U.S. at 427.

In the *Hayman* case,[59] the first Section 2255 case to reach this Court, the Ninth Circuit had declared 28 U.S.C. §2255 to be an unconstitutional suspension of the writ of habeas corpus. *Hayman v. United States*, 187 F.2d 456 (9th Cir. 1951).[60] This Court appointed Professor Paul A. Freund to represent Hayman and was presented with a thorough brief arguing that Congress was powerless to tamper with habeas corpus on account of the Suspension Clause.[61] However, the *Hayman* Court found it unnecessary to confront the knotty constitutional issues that Professor Freund had briefed. The Court found that Congress had not intended any diminution of a federal prisoner's right to attack his conviction collaterally. After an exhaustive review of the practical problems caused by federal prisoners filing their writs where they were confined and of the legislative history, 342 U.S. at 214-19, the *Hayman* Court found that:

[59]The background of Section 2255 and the *Hayman* case are more fully discussed in Part I(C), *supra*.

[60]Hayman, who was incarcerated outside the district in which he had been convicted, was not brought into court for the hearing that was held on his Section 2255 motion. He claimed that since the right to be present would have extended to a similar hearing on a petition for habeas corpus, it was an unconstitutional suspension of the writ to deny him this right under 28 U.S.C. §2255. This Court agreed that Hayman had a right to be present but found that Congress had not intended to deprive him of that right when it enacted Section 2255. Since Section 2255 encompassed the right to be present, as well as every other substantial right implicated in traditional habeas corpus, this Court found that the writ was not suspended.

[61]See footnote 49, *supra*.

> The motion remedy broadly covers all situations where the sentence is "open to collateral attack." As a remedy, it is intended to be as broad as habeas corpus. Statement of Judicial Conference Committee on Habeas Procedure. 342 U.S. at 217.

The history of Section 2255 led this Court to the following conclusion:

> Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum. 342 U.S. at 219.

In sum, this Court held that the remedy provided by Section 2255 was exactly the same as that supplied by habeas corpus except that the location of the litigation was shifted into the Article III court where the conviction had been entered rather than the district of confinement.[62]

In a later case, *Sanders v. United States*, 373 U.S. 1 (1963), this Court reviewed both the "exactly commensurate" test of *Hill* and the constitutional background

[62]One significant implication of the decision in *Hayman* is that Subsection 110(d), which is taken almost verbatim from the fourth paragraph of Section 2255 as interpreted in *Hayman*, cannot mean what it apparently says. The government argues that Subsection 110(g) should be read literally but would presumably concede that Subsection 110(d) cannot be read literally. Mr. Pressley argues that statutes in the post-conviction attack area must be, and have been, interpreted so as to give effect to Congress' intention not to infringe on traditional habeas corpus and so as to avoid serious constitutional doubts that would otherwise arise under the Suspension Clause. See footnote 65, *infra*.

of *Hayman*. Sanders had filed a Section 2255 motion making certain summary allegations and praying that his conviction be vacated. This first motion was denied without a hearing. Sanders then filed a second motion alleging new grounds (mental incompetency at the time of his plea of guilty) for relief. The district court denied the second motion without a hearing on the grounds that no reason appeared why these allegations had not been included in the first motion. The effect of the denial by the District Court and the holding of the Ninth Circuit, which affirmed, was that the matter had become *res judicata* as a result of the ruling on the first motion.

This Court examined the language in 28 U.S.C. §2255 that appeared to bar successive motions where "similar relief" is being sought.[63] The Court recognized that the "language might seem to empower the sentencing court to apply *res judicata* virtually at will." However, the Court was quick to say: "But the language cannot be taken literally." 373 U.S. at 13. Instead this Court read the words concerning successive motions to be "the material equivalent of 28 U.S.C. §2244," the section of the general habeas corpus statutes dealing with successive petitions. 373 U.S. at 14. Section 2244, Title 28, United States Code, in turn was interpreted as not imposing by statute any doctrine of *res judicata* that did not apply to common law habeas corpus. 373 U.S. at 11-12.[64] For as this Court

[63]"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 28 U.S.C. §2255.

[64]For the proposition that the traditional writ of habeas corpus was not subject to the doctrine of *res judicata*, the *Sanders* court relied on *Price v. Johnston*, 334 U.S. 266 (1948), and the cases cited at 373 U.S. at 7-8.

said "... if construed to derogate from the traditional liberality of the writ of habeas corpus, ... §2244 might raise serious constitutional questions." 373 U.S. at 11-12, citing the Suspension Clause and *Fay v. Noia*, 372 U.S. 391, 406 (1963).[65]

[65]The language concerning successive motions was also carried verbatim from the fifth paragraph of 28 U.S.C. §2255 into 23 D.C. Code §110(e). To paraphrase *Sanders*, "the language cannot be taken literally" there either. Once again, the government's literalism presumably only extends to the borders of Subsection 110(g) and does not carry over into Subsections 110(d) and 110(e). See footnote 62, *supra*. A number of other troublesome issues are raised by the government's "literal" reading of 23 D.C. Code §110. For instance, Section 110 appears to prohibit "any Federal court" from hearing a habeas corpus petition brought by a Superior Court prisoner to attack the legality of his conviction. Read literally, that prohibition would prevent this Court from entertaining its "original" writ on behalf of Superior Court prisoners. This would be startling since although little used in modern times on account of the present structure of the habeas corpus statutes, this Court's original writ exists, *e.g.*, *Mooney v. Holohan*, 294 U.S. 103 (1935), and is generally thought to be "unsuspendable." Oaks, *The "Original" Writ of Habeas Corpus in the Supreme Court*, 1962 Supreme Court Rev. 153. In addition, a literal reading of 23 D.C. Code §110 that would cut off local court prisoners' access to the inferior Article III courts might place on this Court an additional responsibility to be generous with its discretionary writ of certiorari in cases coming from the local courts to resolve conflicts between those courts and the Article III courts in the District of Columbia on points of federal constitutional law. *Pernell v. Southall Realty*, 416 U.S. 363, 368 n. 4 (1974). In the states, many of those conflicts arising in criminal cases are resolved by the exercise of the federal habeas jurisdiction. Another issue raised by the government's literal reading is the role of *Younger v. Harris*, 401 U.S. 37 (1971), requiring abstention by the federal courts to allow the state judicial process to run its full course, in a system in which federal constitutional questions are not amenable to review in the

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The meaning of the words in Section 2255 dealing with successive petitions was limited to the same meaning as Section 2244, the general habeas statute, and the common law doctrine concerning *res judicata* in habeas corpus. This Court reached this result because Section 2255, like Section 2244, was constitutional only if it was exactly as broad in its terms as common law habeas corpus. This Court quoted the "exactly commensurate" test from *Hill, supra*, 368 U.S. at 427, and then adverted to the constitutional problems that would be raised by any construction of §2255 that would make it less than "exactly commensurate" with habeas corpus:

> Indeed, if [Sanders] were subject to any substantial procedural hurdles which made his remedy under §2255 less swift and imperative than federal habeas corpus, the gravest constitutional

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inferior federal courts even after the state process is completed. *Pernell v. Southall Realty, supra*, 416 U.S. 363, 368 n. 4 (1974). Finally, the language of 23 D.C. Code §110(g), read literally, would by negative implication, allow a state court to issue a writ of habeas corpus for a Superior Court prisoner whose Section 110 remedy was inadequate or ineffective. This literalism would overrule *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859); *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872), and more than one hundred years of constitutional decisions under the Supremacy Clause holding that states courts cannot free a prisoner of the United States because they disagree with a federal court's interpretation of the federal Constitution. The government's brief does not undertake to explain how Congress could have intended these consequences of its literal words without giving a hint in the legislative history.

doubts would be engendered, as the Court in *Hayman* implicitly recognized. 373 U.S. at 14.

This Court's decisions in *Hayman* and *Sanders* demonstrate that the Court is constitutionally compelled to protect traditional federal habeas corpus for federal prisoners from legislative dilution.[66] While this Court has acknowledged that there can be substitutes for federal habeas corpus, those substitutes must be "exactly commensurate" with traditional habeas corpus in order to avoid running afoul of the Suspension Clause. Congress can change the name of the remedy and can choose which Article III court the prisoner must file in; it cannot constitutionally subtract from the substance of the writ of habeas corpus. Part of the substance of Mr. Pressley's right to the writ is his right to be heard in an Article III court with all that that entails in terms of salary and tenure protections and resulting judicial independence.

C. A Post-Conviction Remedy In the Local Courts Is Not "Exactly Commensurate" With the Habeas Corpus Remedy Because a Remedy in an Article I Court Is Not the Same As a Remedy in an Article III Court.

From the Declaration of Independence down to the decision in *Palmore v. United States*, 411 U.S. 389

[66]*See Davis v. United States*, 417 U.S. 333, 343 (1974), pointing out that if Section 2255 does not include every claim that could be heard on habeas corpus, then it would be under a "shadow," presumably a constitutional shadow. *See Schlesinger v. Councilman*, 420 U.S. 738, 750 (1975), for the proposition that Congress in legislating in this area has acknowledged "the special constitutional status of that writ [habeas corpus] under the Suspension Clause, a status shared by no other form of collateral relief."

(1973), all the authorities are unanimous that there is a fundamental difference between the Article III courts, which enjoy salary and tenure protections, and all other non-Article III courts.

The government seeks to minimize that fundamental difference and argues that, since the new local courts are somewhat like the Article III courts, the post-conviction remedy in those courts is close enough to "exactly commensurate" with traditional habeas corpus to slide by the constitutional test. This kind of constitutional approximation is not warranted. First, where habeas corpus is concerned, "close to commensurate" is not enough. Second, the new local courts are not really close to Article III courts in their most important aspects.

The history of the salary and tenure protections demonstrate their importance in our constitutional scheme. One of the "injuries and usurpations" with which the colonists taxed King George III in the Declaration of Independence was that: "He has made Judges dependent on his Will alone for the tenure of their offices, and the amount and payment of their salaries."

The colonists' complaint against King George was subsequently reinforced by their own unhappy experiment under the Articles of Confederation with a national government that had no national courts. Without national courts to enforce and protect national values, our first federal government was quickly mired in disunity and sectionalism.[67]

[67]"(T)he United States afford the extraordinary spectacle of a government destitute even of the shadow of constitutional power to enforce the execution of its own laws." *The Federalist*, No. 21.

The founders of this country felt strongly that the Article III judges would have qualities that other judges would not have. The most important of these qualities was independence. The Constitution absolutely protects the Article III judges' independence through the following language in Article III, §1, of the Constitution:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The importance of these protections and the concommitant independence of Article III judges has been commented on throughout our entire legal history. Mr. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1921), discussing the necessity of federal enforcement of federal rights, said this:

> In many states the judges are dependent for office and for salary on the will of the legislature. The constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist. . . . How extensive may be the mischief if the first decisions in such cases should be final! 6 Wheat. at 386-387.

In *Glidden v. Zdanok*, 370 U.S. 530 (1962), the justices were deeply divided over whether the judges in question were Article I or Article III judges. But not one justice, either in the majority or in dissent, suggested that the differences between the two were unimportant or trivial.

That the distinction between Article III and non-Article III judges is still thought to be fundamentally significant is evidenced by the fact that this Court in *Palmore v. United States*, 411 U.S. 389 (1973), was at pains to point out that criminal cases in the District of Columbia can be tried in Article I courts not because there is no difference between Article I and Article III courts but because Congress was not constitutionally bound to provide an Article III court for that purpose.

> We do not discount the importance attached to the tenure and salary provisions of Article III, but we conclude that Congress was not required to provide an Article III court for the trial of criminal cases arising under its laws applicable only within the District of Columbia. 411 U.S. at 410.

One of the best summations of the past comments on the important role the salary and tenure protections are thought to play is contained in *Evans v. Gore*, 253 U.S. 245 (1920). Mr. Pressley has set forth in the Appendix of this brief an extensive excerpt from the opinion in the *Evans* case. The excerpt collects the views of authorities such as Alexander Hamilton, Chief Justice Marshall, Mr. Justice Story, Chancellor Kent, and President Woodrow Wilson on the importance of salary and tenure protections. Review of the strongly worded sentiments of these writers serves to re-emphasize the significance that commentators have attached to the independence that flows from these protections.

In the face of the weight of legal history, the government argues that since "the structure [of the new local courts] created by Congress goes far toward

providing analogous assurances to Superior Court judges," the Section 110 remedy is close enough to Article III habeas corpus to pass the "exactly commensurate" test. Pet. Br. 60. The government's argument is ill-founded, both as a matter of law and of fact.

The cases demonstrate that this Court has strictly insisted on the "exactly" in the "exactly commensurate" test for what will constitutionally substitute for habeas corpus. For example, in *Sanders v. United States*, 373 U.S. 1 (1963), discussed more fully in Part II(B), *supra*, this Court held that the *res judicata* rules of Section 2255 had to be precisely the same as they were in the traditional habeas cases in order to avoid collision with the Suspension Clause. The "exactly commensurate" test was stated very broadly there:

> Indeed, if (the prisoner) were subject to any substantial procedural hurdles which made his remedy under §2255 less swift and imperative than federal habeas corpus, then the gravest constitutional doubts would be engendered. . . . 373 U.S. at 14.

In addition, as a matter of fact, the government's argument that "assurances" that are "analogous" to the salary and tenure protections of Article III have been made to Superior Court judges is not correct. Pet. Br. 60. Article III judges serve "during good behavior" and cannot be removed except by impeachment. District of Columbia judges serve for fifteen years. 11 D.C. Code §1502. *See* District Charter, 11 (Appendix) D.C. Code §431(c) (Supp. 1975).

During their fifteen-year terms,[68] the local judges are subject to removal, suspension, censure, or involuntary

[68]New judicial appointments are made by the President, who must choose from lists of names submitted to him periodically by the newly-created District of Columbia Judicial Nomination Commission. 11 (Appendix) D.C. Code §434 (Supp. 1975).

retirement by the District of Columbia Commission on Judicial Disabilities and Tenure. The genesis of the Commission is in the political process. Its members are appointed by the President of the United States, the unified Bar, the elected City Council, and the Chief Judge of the United States District Court. 11 (Appendix) D.C. Code §§433, 434 (Supp. 1975). The criteria upon which the Tenure Commission is to act in disciplining judges are so loosely drawn as to invite subjective judgments. The Court Reorganization Act gives the following bases for disciplinary action:

> (A) willful misconduct in office;
> (B) willful and persistent failure to perform judicial duties; or
> (C) any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute.

11 D.C. Code §1526 (A)(2). *See also* 11 (Appendix) D.C. Code §432 (a)(2) (Supp. 1975).

At the end of their terms, the judges of the local courts are subject to evaluation as to their fitness for reappointment to the bench. This evaluation is also performed by the Tenure Commission. The Court Reorganization Act gives the Tenure Commission no guidance whatsoever on how to evaluate sitting judges for reappointment.

Into the subjective void left by the statute, extrajudicial considerations will, and already have, rushed. In the case of the very first judge considered for reappointment by the Tenure Commission, parties that were actively litigating before the judge in question took strong positions on his fitness for reappointment. The Commission was urged to take his judicial philosophy and his rate of reversal by the District of

Columbia Court of Appeals into account. *Washington Post*, Aug. 11, 1976, at A-1, col. 4; *Washington Star*, Aug. 11, 1976, at A-2, col. 1. Upcoming judicial candidates before the Commission promise even more controversy. What effect these disputes will have on the conduct of sitting judges who will in the future be candidates for reappointment can only be guessed at.

The salaries of the local judges are set by statute at ninety percent of the salaries of the United States District Court judges. 11 D.C. Code §904. Unlike the Article III judges, however, no statute or constitutional provision prohibits the diminution of the salaries of the local Article I court judges.

In short, the facts show that the new local courts are substantially different from the Article III courts in terms of tenure and salary protections, a difference that the Framers and this Court have consistently emphasized as being fundamental. Those differences mean that a post-conviction motion in the local courts is not "exactly commensurate" with a writ of habeas corpus in the Article III courts.

But none of these difficult questions of whether this statute can pass constitutional muster needs to be faced unless this Court finds that 23 D.C. Code §110 will not admit of any interpretation that does not infringe on the habeas jurisdiction of the Article III courts.[69] If as

[69]Any statute that singles out prisoners of the local District of Columbia courts from other persons held by authority of the United States and discriminates against them in terms of their access to habeas corpus in the Article III courts would raise equal protection problems. The Court of Appeals found these potential problems to be substantial. 515 F.2d at 1304-5. There is a line of cases in the District of Columbia that deals with similar statutes. *United States v. Thompson*, 147 U.S. App. D.C. *(continued)*

did the eight judge majority of the Court of Appeals, this Court construes 23 D.C. Code §110 so as to avoid a collision with the Suspension Clause, then none of these questions need be decided.

(footnote continued from preceding page)

1, 452 F.2d 1333 (1971); *United States v. Brown*, 157 U.S. App. D.C. 311, 483 F.2d 1314 (1973); *United States v. Hairston*, 161 U.S. App. D.C. 466, 495 F.2d 1046 (1974). *See also United States v. Henson*, 159 U.S. App. D.C. 32, 49 n. 20, 486 F.2d 1292 n. 20 (1973) (*en banc*). These cases have not yet found their way into this Court. And yet if this Court holds that 23 D.C. Code §110 restricts Article III habeas corpus and that the Suspension Clause is no bar to such a restriction, then the application of the constitutional holdings in these cases would also be presented for decision by this Court.

CONCLUSION

Mr. Pressley prays this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX

Excerpt from *Evans v. Gore*, 253 U.S. 245 (1920):

The particular need for making the judiciary independent was elaborately pointed out by Alexander Hamilton in the Federalist, No. 78, from which we excerpt the following:

> "The executive not only dispenses the honors, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force or will, but merely judgment. . . . This simple view of the matter suggests several important consequences: It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks."
>
> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

At a later period John Marshal, whose rich experience as lawyer, legislator, and chief justice enabled him to speak as no one else could, tersely said (Debates Va. Conv., 1829-1831, pp. 616, 619):

> "Advert, sir, to the duties of a judge. He has to pass between the government and the man whom that government is prosecuting: between the most powerful individual in the community, and the poorest and most unpopular. It is of the last importance that, in the exercise of these duties, he should observe the utmost fairness. Need I press the necessity of this? Does not every man feel that his own personal security and the security of his property depends on that fairness? The Judicial Department comes home in its effects to every man's fireside: it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? . . . I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

More recently the need for this independence was illustrated by Mr. Wilson, now the President, in the following admirable statement:

> "It is also necessary that there should be a judiciary endowed with substantial and independent powers, and secure against all corrupting or perverting influences; secure, also, against the arbitrary authority of the administrative heads of the government."
>
> "Indeed, there is a sense in which it may be said that the whole efficacy and reality of constitutional government resides in its courts. Our

> definition of liberty is that it is the best practicable adjustment between the powers of the government and the privileges of the individual."
>
> "Our courts are the balance wheel of our whole constitutional system; and ours is the only constitutional system so balanced and controlled. Other constitutional systems lack complete poise and certainty of operation because they lack the support and interpretation of authoritative, undisputable courts of law. It is clear beyond all need of exposition that for the definite maintenance of constitutional understandings it is indispensable, alike for the preservation of the liberty of the individual and for the preservation of the integrity of the powers of the government, that there should be some nonpolitical forum in which those understandings can be impartially debated and determined. That forum our courts supply. There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it adjudged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed. The constitutional powers of the courts constitute the ultimate safeguard alike of individual privilege and of governmental prerogative. It is in this sense that our judiciary is the balance wheel of our entire system: it is meant to maintain the nice adjustment between individual rights and governmental powers which constitutes political liberty." Constitutional Government in the United States, pp. 17, 142.

Conscious of the nature and scope of the power being vested in the national courts, recognizing that they would be charged with responsibilities more

delicate and important than any ever before confided to judicial tribunals, and appreciating that they were to be, in the words of George Washington, "the keystone of our political fabric," the convention with unusual accord incorporated in the Constitution the provision that the judges "shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office." Can there be any doubt that the two things thus coupled in place–the clause in respect of tenure during good behavior and that in respect of an undiminishable compensation–were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task, and with the imperative need for its impartial and fearless performance? Mr. Hamilton said in explanation and support of the provision (Federalist No. 79): "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*. . . . The enlightened friends to good government in every state have seen cause to lament the want of precise and explicit precautions in the state constitutions on this head. Some of these, indeed, have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite . . . This provision for the support of the judges bears every mark of prudence and efficacy; and

it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states in regard to their own judges." The several commentators on the Constitution have adopted and reiterated this view,–Judge Story adding: "Without this provision [as to an undiminishable compensation], the other, as to the tenure of office, would have been utterly nugatory, and indeed a mere mockery;" and Chancellor Kent observing: "It tends, also, to secure a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuits of private business for the duties of that important station." 253 U.S. at 249-253. (footnotes omitted) (emphasis in original).